Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
1996 Term

SHARON L. WRIGHT

Petitioner

v.

PAMELA CARTER, Individually and In Her Official Capacity as Attorney General of the State of Indiana; DAVID F. HAMILTON, JANICE E. KREUSCHER, DENNIS P. LEE and MATTHEW R. GUTWEIN, Individually and Personally Liable

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Charles W. Linder, Jr.
LINDER & HOLLOWELL
P. O. Box 845
Indianapolis, IN 46206-0845
(317) 637-3170
Attorney for Petitioner

31 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether in discharging Wright, the elected Attorney General of the State of Indiana is absolutely immune from liability and exempt from the federal constitutional prohibition against politically motivated discharge of government employees, even though Indiana State law provides that the Attorney General and attorneys employed in the Office of Attorney General as defense counsel are politically independent.

2. Whether all attorneys whatsoever employed in the Office of Attorney General of the State of Indiana are exempt from the definition of "employee" under the federal Age Discrimination in Employment Act, thereby permitting the Indiana Attorney General to engage in age discrimination in the employment of attorneys.

PARTIES TO THE ORIGINAL PROCEEDINGS

A. Petitioner-Original Plaintiff (Appellant in Seventh Circuit):

SHARON L. WRIGHT

B. Respondents-Original Defendants (Appellees in Seventh Circuit):

PAMELA CARTER, Individually and in her Official Capacity as Attorney General of the State of Indiana; DAVID F. HAMILTON, JANICE E. KREUSCHER, DENNIS P. LEE, and MATTHEW R. GUTWEIN, Individually and Personally Liable.

C. References:

Hereinafter the Petitioner shall be referred to as "Wright" and the Respondents shall be referred to as "Carter" and/or "Attorney General" of the State of Indiana.

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The unpublished decision of the U.S. Court of Appeals for the Seventh Circuit dated August 9, 1996

The ruling of the U.S. District Court dated May 11, 1996, entered May 30, 1996 by Amended Entry of Judgment, granting Defendants' Motion to Dismiss

The ruling of the U.S. District Court for the Southern District of Indiana in Americanos v. Carter, et al., Cause No. IP-94-0040-C, granting Defendants' Motion to Dismiss, and incorporated by reference into Order dismissing Wright's action

TABLE OF AUTHORITIES

Cases:

Americanos v. Carter, 74 F.3d 138 (7th Cir. 1996), *cert. denied* 2

Branti v. Finkel, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 547 (1980) 9

Burns v. Reed, 111 S.Ct. 1934, 500 U.S. 478, 114 L.Ed.2d 547 (1991) 9

Elrod v. Burns, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) 9

Indiana State Toll Bridge Comm. v. Minor, 139 N.E.2d 445 (Ind. 1957) 9

Rutan v. Republican Party of Illinois, 110 S.Ct. 2729 (1990) 9

State ex rel. Sendak v. Marion County Superior Court, 373 N.E.2d 245 (Ind. 1978) 8

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PAMELA CARTER, Individually and In Her Official Capacity as ATTORNEY GENERAL OF THE STATE OF INDIANA; DAVID F. HAMILTON, JANICE E. KREUSCHER, DENNIS P. LEE and MATTHEW R. GUTWEIN, Individually and Personally Liable

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OPINIONS BY OTHER COURTS

Wright v. Carter, unpublished (Seventh Circuit, August 9, 1996)(A-1 to A-3)

Wright v. Carter, et al., unpublished (U.S. District Court, Southern District of Indiana, May 11, 1995, Amended Entry of Judgment May 30, 1995) (A-4 to A-6)

Americanos v. Carter, et al., unpublished (U.S. District Court, Southern District of Indiana, December 13, 1994), incorporated by reference into U.S. District Court's opinion and referred to in *Seventh Circuit's opinion in Wright v. Carter* (A-7 to A-13)

In its unpublished opinion herein, the Seventh Circuit also relied upon *Americanos v. Carter*, 74 F.3d 138 (7th Cir. 1996), *cert. denied*, containing the reasons for affirming the U.S. District Court's order dismissing Wright's lawsuit.

JURISDICTIONAL STATEMENT

Wright seeks review of the decision of the United States Court of Appeals for the Seventh Circuit dated August 9, 1996, whereby it affirmed the decision of the United States District Court for the Southern District of Indiana in which the District Court had dismissed Wright's action for failure to state a claim.

Jurisdiction of the federal courts is invoked pursuant to the provisions of 28 U.S.C. 1331 and 1343 to hear Wright's claims under the United States Constitution and laws, and brought pursuant to 29 U.S.C. 621 et seq.,42 U.S.C. 1983, and the First and Fourteenth Amendments to the Constitution of the United States.

The Order by the District Court dismissing Wright's action on the merits contained sufficient language as to "finality" to provide Wright an appeal as a matter of right pursuant to 28 U.S.C. 1291.

With the August 9, 1996 decision by the Court of appeals affirming the summary judgment ruling, Wright files her petition for writ of certiorari and the jurisdiction

of the United States Supreme Court is invoked pursuant to 28 U.S.C. 1254.

APPLICABLE STATUTORY PROVISIONS

A. **29 U.S.C. 623. Prohibition of age discrimination.**

It shall be unlawful for an employer --

> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . .

29 U.S.C. 630(f) Definitions.

For the purposes of this chapter -- * * *

> (f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. . . .

B. **42 U.S.C. 1983. Civil action for deprivation of rights.**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen fo the United State or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

C. **Constitution of the United States: Amendment I.**

Freedom of religion, speech and press; peaceful assemblage; petition of grievances.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

D. **Constitution of the United States: Amendment XIV.**

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction

thereof, are citizens ofthe United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. ***

E. **Fed. R. Civ. P. 12**. Defenses and Objections -- When and How Presented -- By Pleading or Motion -- Motion for Judgment on Pleadings.

* * *

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: * * * (6) failure to state a claim upon which relief can be granted * * *

(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. * * *

STATEMENT OF THE CASE

Wright's federal claims were dismissed on motion of Carter for failure to state a claim under Fed. R. Civ. P. 12(b)(6). On such a motion all allegations of Wright's complaint must be deemed true.

Wright was formerly employed in the Indiana

Office of Attorney General as a defense attorney in the Federal Litigation Section. Wright alleges her discharge from State employment by newly-elected Attorney General Pamela Carter (Democrat) was politically motivated, was age discrimination, and was coupled with conflicts of interest and with false and defamatory statements to the media, stigmatizing Wright in her profession as an attorney, in violation of the Age Discrimination in Employment Act and her First and Fourteenth Amendment civil rights.

Wright is politically independent. She was hired on her resume in 1992, at age 49, during the administration of a Republican, to act as defense counsel in lawsuits against the State and/or its public officials and employees. Wright had no supervisory or other policymaking power or duties. She simply defended lawsuits.

During the 1992 political campaign, Democrat Pamela Carter promised that if elected Indiana Attorney General she would replace currently-employed attorneys with bright, young people just out of law school. Politically-motivated discharges rapidly followed Carter's election. The majority of attorneys discharged as of Wright's termination were over the age of 40. Wright was at that time 50 years old, although recently hired.

As Attorney General, Carter came into office with multiple conflicts of interest. Wright was handling the defense of multiple cases pending in federal court as to which incoming supervisor Janice E. Kreuscher had a conflict of interest. It not being expected that Wright would willingly resolve those conflicts against defendants represented by her to the benefit of Carter's political backers, Wright was fired.

During her campaign and subsequently, Pamela Carter informed the media that attorneys being discharged by her had "poor work product". She stated on night news that you cannot hire "good" lawyers at $25,000 a year -- the salary which was paid to Wright.

By Entry of Judgment dated May 30, 1995, the District Court dismissed Wright's federal claims for failure to state a claim upon which relief can be granted, and declined to exercise jurisdiction over Wright's State law claims. The Seventh Circuit affirmed the district court's order dismissing Wright's action.

Thus the Indiana Attorney General has been allowed absolute immunity to engage in conflicts of interest, age discrimination and politically-motivated discharges from State employment. Vesting such unbridled political power in the Attorney General undermines the power of the Indiana State Supreme Court, which has already upheld the purpose of the Indiana Legislature when creating the Office of Attorney General as being to provide independent legal representation to the State and to its officials and employees sued within the scope of their employment for injury to others.

Wright's position as defense counsel in the Federal Litigation Section required that she be politically independent in carrying out her duties of office. Since Wright's position as defense counsel was not a political position, Wright was not exempt from the protections of the United States Constitution and the Age Discrimination in Employment Act. Therefore Carter and the other defendants should be held liable, and decisions of the lower courts should be reversed.

ARGUMENT

1. The elected Attorney General of the State of Indiana is not exempt from the federal constitutional prohibition against politically motivated discharge of government employees, because Indiana State law provides that attorneys employed in the Office of Attorney General as defense counsel are politically independent.

The decision of the United States Court of Appeals affirming dismissal of Wright's federal claims has decided a federal question in conflict with the Indiana statutes creating the Office of Attorney General and decisions of the Indiana Supreme Court.

Indiana statutory provisions regarding the Office of Attorney General are found at Ind.Code 4-6-1-2. Article 6 consists of eleven chapters. Chapter 5 contains special provisions regarding the appointment and assignment of deputies to State agencies to carry out the duties of the Attorney General, Ind.Code 4-6-5-1. This section does not pertain to defense counsel hired in the Federal Litigation Section, and is therefore misapplied by the lower courts.

In State ex rel. Sendak v. Marion County Superior Court, 373 N.E.2d 145, 149 (Ind. 1978), the Indiana Supreme Court was presented the issue whether the Indiana Legislature had unconstitutionally usurped the Governor's power to set policy for the State of Indiana by withdrawing his power to select the State's lawyers. The Indiana Supreme Court rejected the very argument relied upon herein by the United States District Court, stating as follows:

In defending a lawsuit the Attorney General is

not dictating policy or directing the State, but is merely defending the State.

Further, in Indiana State Toll Bridge Comm. v. Minor, 139 N.E.2d 445, 448 (Ind. 1957), the Indiana Supreme Court references the Indiana Attorney General's "duty to give independent legal advice", in order to furnish some protection to the individual citizen against political results in a controversy with the State or its agencies.

Thus, the duty imposed upon the Attorney General and all deputy attorneys to provide independent legal representation overrides any personal loyalty to a political party or group. The Indiana Rules of Professional Conduct, Rule 1.2, expressly provides that representation of a client (even a governmental client) does not constitute an endorsement of the client's political views. As Attorney General, Carter is not empowered to assure that all lawyers in her Office give legal advice and representation which is politically correct from her viewpoint, because she is by law *herself* required to provide *independent* representation and advice to the State and its agencies, officials and employees.

To reach an opposite conclusion, the District Court and the Seventh Circuit Court of Appeals ignore Indiana law as well as the longstanding decisions of the United States Supreme Court prohibiting political firings: Elrod v. Burns, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976); Branti v. Finkel, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 547 (1980); Rutan v. Republican Party of Illinois, 110 S.Ct. 2729, 2737 (1990).

Subsequent to Burns v. Reed, 111 S.Ct. 1934, 500 U.S. 478, 114 L.Ed.2d 547 (1991), aff'd in part, rev'd in part, and remanded (Indiana prosecutor entitled to only

qualified immunity for giving legal advice to police), a government lawyer cannot be required to fashion his legal advice so as to implement the political goals of the Attorney General in power without regard to violation of clearly-established Constitutional rights of citizens affected, on danger of losing his job.

Carter and her chosen staff have been permitted to cure their conflicts of interests and resolve pending cases to the benefit of their political backers by firing defense lawyers and replacing them with young, inexperienced lawyers less likely to perceive the implications of their conduct. In the process Carter wrongfully stigmatized those fired by false reports to the media that these persons had poor work product and were not good lawyers, without any meaningful redress to those harmed. Wright should be allowed redress for the harm.

In conclusion, the United States Court of Appeals for the Seventh Circuit has erroneously decided that all attorneys employed in the Office of the Indiana Attorney General are exempt from the prohibition against politically-motivated discharges, in conflict with decisions of the Indiana Supreme Court, and in conflict with applicable decisions of this Court.

2. Wright is not exempt from the definition of "employee" in the ADEA, and Attorney General Pamela Carter engaged in unlawful age discrimination in the employment of attorneys by discharging Wright.

It is unlawful for an employer to discriminate against an employee or potential employee between the ages of 40 and 70 on the basis of age. 29 U.S.C. § 621, et seq. During her campaign and after, Carter stated that she intended to replace older attorneys with young people.

After her election, Carter demanded resignations and discharged numerous lawyers, the majority of whom were over the age of forty, replacing them with a group of younger attorneys. Plaintiff was 50 years old when fired.

Plaintiff has stated a prima facie case of age discrimination under the ADEA. Nevertheless, the District Court and Seventh Circuit Court of Appeals permit such age discrimination in the Office of Attorney General under the guise that all deputy attorneys fall within the exemptions contained in the definition of "employee" at 29 U.S.C. § 630(f) as follows:

> (f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate advisor with respect to the exercise of the constitutional or legal powers of the office....

In their written opinions, the District Court and the Court of Appeals for the Seventh Circuit assume facts not pleaded nor in evidence. Wright was not elected, nor chosen by Attorney General Pamela Carter to be on her personal staff, nor an appointee on the policymaking level, nor an immediate advisor with respect to the exercise of the powers of the office. Nonetheless she was chosen for discharge as part of the group of attorneys over the age of forty who were denied continued employment by the State.

Obviously, youth is not a proper requisite for the position of deputy attorney general. The fact that Pamela Carter campaigned on the issue of hiring youth to replace age does not justify her conduct in violation of federal statutory law, the policies sanctioned by the United States electorate overriding those of any supposed, but denied, local mandate that the Attorney General engage in age, race, or other discrimination in employment practices.

Respectfully submitted,

CHARLES W. LINDER, JR.
Linder & Hollowell
P.O. Box 845
Indianapolis, IN 46206-0845
Attorney for Petitioner
Sharon L. Wright